

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 98-0267 ITC
GROSS AND ADJUSTED GROSS INCOME TAX
For Years 1992, 1993, AND 1994**

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ISSUES

I. Adjusted Gross Income Tax – Sales Factor

Authority: IC § 6-3-2-2; IC § 6-3-2-12

Taxpayer protests exclusion of foreign dividends from sales factor denominator.

II. Adjusted Gross Income Tax – Negligence Penalty

Authority: 45 IAC 15-11-2; IC § 6-8.1-10

Taxpayer protests imposition of 10% negligence penalty.

STATEMENT OF FACTS

Taxpayer is an out-of-state corporation with some operations in Indiana. Taxpayer receives income from sources within Indiana, national, and foreign investments. The Department removed taxpayer's foreign dividends from the denominator of the sales apportionment formula and taxpayer is protesting said removal and the imposition of the negligence penalty.

I. Adjusted Gross Income Tax – Sales Factor

DISCUSSION

Taxpayer receives foreign dividends from its subsidiaries. The auditor removed this dividend income from the taxpayer's sales factor. Taxpayer argues that the denominator of the sales factor includes total sales for everywhere during the year, based on IC § 6-3-2-2(e), which states:

The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year. Sales include receipts from intangible property and receipts from the sale or exchange of intangible property. However, with respect to a foreign corporation, the denominator does not include sales made in a place that is outside the United States. Receipts from intangible personal property are derived from sources within Indiana if the receipts from the intangible personal property are attributable to Indiana under section 2.2 of this chapter...

Taxpayer does not cite or establish that the definition of sales includes foreign dividends and even if taxpayer could, such sales would be excluded from taxpayer's sales denominator pursuant to IC § 6-3-2-2(e). The statutory reference given only extends to "include receipts from intangible property and receipts from the sale or exchange of intangible property." In this circumstance, this does not encompass the receipt of foreign dividends.

Additionally, taxpayer does not reference IC § 6-3-2-12, which states in relevant part:

A corporation that includes any foreign source dividend in its adjusted gross income for a taxable year is entitled to a deduction from that adjusted gross income. The amount of the deduction equals the product of:

- (1) the amount of the foreign source dividend included in the corporations adjusted gross income for the taxable year; multiplied by
- (2) the percentage prescribed in subsections (c), (d), or (e), as the case may be.

In this instance, the foreign dividends at issue are completely deducted from taxpayer's business income based on IC § 6-3-2-12. It follows that the exclusion of foreign income in apportionment calculations is required, inasmuch as taxpayer's Indiana adjusted gross income (as required in IC § 6-3-2-12) does not include foreign dividends. Using foreign income receipts to weight taxpayer's domestic income apportionment has no logical or statutory basis.

Taxpayer has failed to establish a statutory requirement to include the foreign dividends in the apportionment calculation and has not demonstrated why -given the absence of foreign dividend income in the income to be apportioned- foreign source dividends should be used to weight the denominator in the apportionment calculation.

FINDING

Taxpayer protest is denied.

II. Adjusted Gross Income Tax – Negligence Penalty

DISCUSSION

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10. The Indiana Administrative Code further provides:

(b) “Negligence” on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.
45 IAC 15-11-2.

While taxpayer's position was not upheld, it was based, at least in part, on reasonable interpretations of Indiana's tax statutes. Consequently, the negligence penalty will be waived for the tax years at issue.

FINDING

Taxpayer protest sustained.

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